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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

The People of the State of New York, *ex rel.*
BERNARD S. COGAN,
Petitioner,

v.

MARY MANN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE RESPONDENT MARY MANN IN OPPOSITION

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Opinion Below

There was no opinion of the Court of Appeals of the State of New York.

Jurisdiction

The petitioner invokes jurisdiction under Title 28, U. S. C., Section 344.

Question Presented

There is no Federal question presented which this Court has power to review.

Statement

The petitioner seeks this writ to review a final decree of the Court of Appeals of the State of New York, entered February 26, 1942 (R. 29), which affirmed an order of the Appellate Division of the Supreme Court, First Department (R. 26), which affirmed an order of the Supreme Court, New York County, dated September 29, 1941 (R. 3), dismissing a writ of *habeas corpus* obtained by Bernard S. Cogan, the petitioner, directed to his former wife, Mary Mann, the respondent, for the purpose of determining the custody of their children (R. 4).

It appeared from the return (R. 17) to the said writ that prior to the entry of the order of September 29, 1941 (R. 3), on September 25, 1941, the Supreme Court, New York County, in a *habeas corpus* proceeding brought by Mary Mann had held that Bernard S. Cogan was unlawfully detaining the said children and directed the return of the children to the custody of their mother, Mary Mann (R. 19).

It appeared and was determined in that proceeding that Mary Mann was entitled to the custody of the said children by the terms of a separation agreement between the parties, dated June 20, 1940, the terms of which have been incorporated in a decree of divorce in an action in Nevada brought by Mary Mann against Bernard S. Cogan, in which action Cogan appeared (R. 18, 19).

Argument

There is no question presented which this Court has the power to review.

The only question determined by the Court of Appeals of the State of New York was that the writ obtained by

Bernard S. Cogan was properly dismissed. Cogan, having sought jurisdiction of that Court, cannot now question its jurisdiction.

Cogan's remedy if he wished to question the jurisdiction of the Supreme Court of the State of New York, was to prosecute his appeal from the order of September 25, 1941, awarding custody of the children to Mary Mann (R. 19). The petitioner, in his brief, at the bottom of page 4, admits that he did not prosecute this appeal, and that it was dismissed. This remedy was pointed out to petitioner in the opinion of the Appellate Division, First Department, on November 28, 1941, in the first *habeas corpus* proceeding (R. 27).

The question of jurisdiction of the Supreme Court, New York County, was raised by Cogan, the petitioner, in the first *habeas corpus* proceeding and decided against him (R. 10, 11, 21).

Under the practice in New York State, a writ of *habeas corpus* may not be used to review a decree of a court of competent jurisdiction, where the question of jurisdiction has already been litigated, the proper remedy being by an appeal from the decree determining jurisdiction. New York Civil Practice Act, Section 1231, Subdivision 2.

People ex rel. Holt v. *Lambert*, 237 A. D. 39, at 41 (affirmed 262 N. Y. 511, without opinion):

> "While it is true as a general rule that lack of jurisdiction to render a particular judgment is always open to question under a writ of *habeas corpus*, there is a well-recognized exception to such rule, and that is, where the question of jurisdiction has already been litigated. As said in *O'Donoghue* v. *Boies* (159 N. Y. 87, 99): 'There is but one solitary exception to this rule, and that is in a case where jurisdic-

tion depends on a fact that is litigated in a suit and is adjudged in favor of the party who avers jurisdiction. Then the question of jurisdiction is judicially decided, and the judgment record is conclusive on that question until set aside or reversed by a direct proceeding.' "

CONCLUSION

There being no question presented which this Court has jurisdiction to review, we respectfully submit that the petition for a writ of certiorari should be denied, with costs to the respondent.

WELLMAN, SMYTH, LOWENSTEIN & FENNELLY,
Attorneys for Respondent.

LEO C. FENNELLY,
Of Counsel.